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82-324
No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CRAIG COLLINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the Constitution Require a District Court Judge to Conduct a Contemporaneous Colloquy with the Defendant to Assure that a Waiver of a Jury Trial is Knowingly, Voluntarily, and Intelligently Accomplished?

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SUPREME COURT OF THE UNITED STATES
FOR THE THIRD CIRCUIT

CRAIG COLLINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Craig Collins, the Petitioner above named, respectfully prays that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered in this case on July 28, 1982.

The Judgment Order of the United States Court of Appeals for the Third Circuit is attached hereto as Appendix A.

JURISDICTION

The Judgment Order of the United States Court of Appeals for The Third Circuit was entered on June 28, 1982; this Court has proper jurisdiction under 28 United States Code §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provision involved in this case is the Sixth Amendment of the United States Constitution, which provides that,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."

STATEMENT OF THE CASE

Petitioner in this matter is Craig Collins, an individual who was indicted as per Criminal No. 81-247 in the United States District Court for The Eastern District of Pennsylvania and charged with Conspiracy, Distribution of Cocaine, and Possession of a Firearm During the Commission of a Felony.

On October 15, 1981, the case was called to trial before United States District Judge John P. Fullam. Following a "waiver" of the right to trial by jury, the case was tried and the Court found the Petitioner guilty on all three counts above stated.

On November 24, 1981, the District Court imposed a period of ninety (90) days imprisonment to be followed by three (3) years probation.

A timely Appeal was taken to the United States Court of Appeals for The Third Circuit which, by Judgment Order dated June 28, 1982, affirmed the Judgment of Conviction and Sentence in this case.

In that appeal, the Petitioner contended that the waiver of jury trial which occurred in this case was inadequate.

Attached to this Petition is Appendix B, a true and correct copy of the Waiver of Jury Trial form executed

by your Petitioner before the District Court. An examination of the form indicates that it supplies no information whatsoever concerning the definition of the term "jury trial". Also attached is the Petitioner's Affidavit[1] submitted in the lower Court indicating that at the time of the proffered waiver he was not aware of the elements of a proper trial by jury. Petitioner further contended that his trial counsel did not fully or properly advise him in this regard either.

The Notes of Testimony from the trial show a two (2) page colloquy between the Court and the Petitioner. The Court told the Petitioner of his absolute right to a trial by jury and advised him that, in a non-jury trial, the Court alone would decide all questions of fact and law. The Court further determined that the Petitioner's decision to seek a trial by a Judge alone was a voluntary decision. However, at no time did the Court inquire of the Petitioner as to whether or not he understood what was involved in giving up a jury trial, including the factors that constitute and define the term of trial by jury.

Before the Third Circuit Court of Appeals, the Petitioner contended that a rule needed to be adopted to the effect that a waiver of a jury trial cannot stand absent an on-the-record colloquy between Court and Petitioner by virtue of which it is affirmatively established that the accused understands all of the elements which constitute a trial by jury. With this contention, the Court of Appeals apparently disagreed.

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1. See Exhibit C.

REASONS FOR GRANTING THE WRIT

This Court should adopt a constitutional rule requiring an on the record contemporaneous colloquy between Court and accused in order to establish the validity of any waiver of trial by jury in any federal criminal case.

There is no question but that the accused in a criminal case has a basic and fundamental constitutional right to have the case heard by a jury. *Nebraska Press Association v. Stuart*, 427, U.S. 539 (1976); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Irvin v. Dowd*, 366 U.S. 717 (1962). This right, which arises from the Sixth Amendment of the United States Constitution, cannot be deemed waived where the record fails to affirmatively demonstrate that the abandonment of the right was not accomplished knowingly, intelligently, and voluntarily. The Petitioner contends that this Court must adopt a constitutional practice requiring an on-the-record, contemporaneous colloquy between the Court and the accused at which the waiver of the constitutional right to trial by jury is explained to the accused, who thereupon must affirmatively agree to waive that right.

There is no question but that the right to trial by jury can be waived or abandoned by a defendant. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942). However, your Petitioner submits that in order for such a basic and fundamental constitutional right to be validly waived, the record of the proceedings must affirmatively establish that the accused understands what is involved in that right and what is involved in the surrendering of the same. With respect to the right to trial by jury, there are three essential ingredients which must be explained to the accused and which were not discussed in the instant case: (1) That the jury must be chosen from the members of the community, or that it

must be a jury of one's peers, (2) That the verdict must be unanimous, and (3) That the accused is allowed to participate with his attorney in the selection of jurors from a larger panel. See *United States v. Delgado*, 635 F.2nd 889 (Seventh Circuit 1981); *United States v. Scott*, 583 F.2nd 362 (Seventh Circuit 1978); See also *Commonwealth v. Williams*, 454 Pa. 368, 373 (1973).

In the instant case, as in *United States v. Scott, supra*, this Court cannot determine from the colloquy and waiver form that the Petitioner in fact understood the meaning of the right to a jury trial and the consequences of the waiver of that right. Unlike *United States v. Delgado, supra*, the attorney for the Petitioner did not state that the right to a trial by jury had been explained to the client.

The Petitioner does not contend that the waiver of a jury trial in this case was induced by coercion or improper promises; rather, it is submitted that the waiver was legally inadequate because the Petitioner was not advised—by Court, counsel, or any form—of what constitutes this right. In *Boykin v. Alabama*, 395 U.S. 238 (1969), this Court held that the constitutional rights which are waived by virtue of a plea can be considered constitutionally acceptable.

This Court held that like a confession, a guilty plea cannot stand unless the record establishes its voluntary nature. Among the constitutional rights waived by virtue of a guilty plea is the right to a trial by jury. In dealing with this issue, this Court stated that "we cannot presume a waiver of these three important federal rights from a silent record." 395 U.S. at 243. This Court concluded that an on-the-record discussion of the waiver factors with the accused will "make sure he has a full understanding of what the plea connotes and of its consequences. When the Judge discharges that function, it

leaves a record adequate for any review that may be later sought." 395 U.S. at 244.

In resolving this issue, this Court cited *Commonwealth ex rel West v. Rundle*, 428 Pa. 102 (1968), a decision of the same Pennsylvania Supreme Court which adopted the rule expounded herein by your Petitioner in *Commonwealth v. Williams, supra.*

As stated by this Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), for the waiver of any constitutional right to be valid, including the right to a trial by jury, the record must affirmatively demonstrate that there has been "an intentional relinquishment or abandonment of a known right or privilege." In the instant case, the record is silent as to whether or not the relinquishment was of a "known" right. See *United States v. Delgado, supra* at 890. Thus, the jury waiver in this case was constitutionally invalid.

CONCLUSION

The Petitioner respectfully submits that the Sixth Amendment of the United States Constitution requires the United States District Trial Judge to conduct a contemporaneous colloquy with any accused in a criminal case to meet its responsibility to assure that the waiver of a jury trial is knowingly, intelligently, and voluntarily accomplished. Such a colloquy must contain, as a matter of constitutional principle, advice to the accused as to all of the essential elements which comprise such a right. Without such an explanation, the waiver is meaningless. In the instant case, the record is devoid of such a colloquy so that this Court must conclude that a new trial has to be awarded to Craig Collins because of this inadequate jury trial waiver.

Respectfully submitted,

/s/ A. Charles Peruto
A. CHARLES PERUTO

/s/ Burton A. Rose
BURTON A. ROSE

Attorneys for Craig Collins

CERTIFICATE OF SERVICE

A. CHARLES PERUTO, Esquire and BURTON A. ROSE, Esquire, being duly sworn according to law, depose and say that a true and correct copy of the within Petition for a Writ of Certiorari has been served upon Thomas H. Lee, II, Esquire, Assistant United States Attorney, 3310 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106.

/s/ A. Charles Peruto
A. CHARLES PERUTO

/s/ Burton A. Rose
BURTON A. ROSE

Attorneys for Craig Collins

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1025

UNITED STATES OF AMERICA,
Appellee,

vs.

COLLINS, CRAIG,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. CRIM. No. 81-00247)

Submitted under Third Circuit Rule 12(6)
on Monday, June 21, 1982

Before: GARTH, BECKER, *Circuit Judges,*
and MUIR, *District Judge**

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* Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

This is an appeal from a final judgment of conviction and sentence. Appellant was convicted after a trial by the court of conspiracy, distribution of cocaine, and possession of a firearm during the commission of a felony. Appellant was sentenced to 90 days of imprisonment on the conspiracy count, and two concurrent three year terms of probation on the latter two counts.

After reviewing and having considered the contentions of the appellant, Collins, to wit: (1) Was the evidence sufficient to prove beyond a reasonable doubt that the appellant was guilty of either conspiracy to distribute cocaine, the distribution of cocaine, or the possession of a firearm during the commission of the crimes charged; and (2) Was the waiver of jury trial inadequate, it is

ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

/s/
Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS, Clerk

Dated: June 28, 1982

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. _____

UNITED STATES OF AMERICA

vs.

_____

WAIVER OF TRIAL BY JURY

The parties to the above entitled cause hereby waive trial by jury herein and submit the same for hearing and decision by the Court.

_____	and	_____
Defendant		Defendant's Counsel
_____	and	_____
Defendant		Defendant's Counsel
_____	and	_____
Defendant		Defendant's Counsel
_____		_____
Dated		Attorney for the U.S.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1025

UNITED STATES OF AMERICA

vs.

CRAIG COLLINS

AFFIDAVIT

COMES NOW, the Appellant in the above-captioned criminal appeal, Craig Collins, and being duly sworn according to law, hereby deposes and avers the following:

1. I was indicted in a three-count Indictment as per Criminal No. 81-00247 in the United States District Court for the Eastern District of Pennsylvania.

2. I was represented at trial by George Gershenfeld, Esquire.

3. On October 15, 1981, I appeared before the Honorable John P. Fullam, United States District Judge, and at that time I executed a form waiving my right to trial by jury and further answered certain questions before the bar of the Court agreeing to waive my right to trial by jury in that case.

4. At no time prior to or during the aforesaid "waiver" did my attorney Mr. Gershenfeld inform me as to the elements which constitute the right to a trial by jury. I was unaware of the aforesaid elements until my

present counsel so advised me subsequent to my retaining his office.

5. Had I been aware that a criminal jury could not have convicted me unless and until they *unanimously* believed that the Government had proven my guilt beyond a reasonable doubt as to each of these charges, I would not have agreed to waive my right to a trial by jury. At no time was I so advised of that fact and I did not know that of my own knowledge at the time that I agreed to surrender my right to a trial by jury.

6. In addition, I did not know that a jury is defined as a panel selected from the community, or a jury "of my peers"; furthermore, at that time, I was not aware of the fact that I would have been permitted to participate in the jury selection process, along with my attorney, had we not agreed to waive a trial by jury. Had I been aware of these factors as well, I would not have agreed to waive my right to a trial by jury.

7. I believe my waiver of trial by jury in this case was not a knowing, intelligent, or voluntary waiver.

Respectfully submitted,

/s/ Craig Scott Collins
CRAIG COLLINS, Appellant

NOTARIZED